IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 618 of 1995

For Approval and Signature:

Hon'ble MR.JUSTICE R.BALIA.

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

BM SHAH EDUCATION SOCIETY

Versus

SHILPABEN B CHAUHAN

Appearance:
MR. N.D. NANAVATI, ADV., for the petitioner
MR A.D. OZA for respondent No. 1.
MR. A.J. DESAI instructed by Mr.
DA BAMBHANIA for Respondent No. 2 and 3
MR VH DESAI for Respondent No. 4
1 and 2 - Yes 3 to 5 - No

CORAM : MR.JUSTICE R.BALIA.
Date of decision: 07/05/97

ORAL JUDGEMENT

Heard learned counsel for the parties. This Special Civil Application is directed against the order of the Gujarat Higher Secondary Education Tribunal dated 17/18-8-1994/3-9-1994. The petitioner is an Education Society which is running and managing Primary, Secondary

and Higher Secondary schools in Bhavnagar city. The services of respondent No.1 Shilpaben B. Chauhan were terminated by the school management on 29.9.1993. That order was challenged before the Tribunal. The Tribunal allowed the appeal and set aside the termination order. The facts giving rise to this petition are : that the respondent No. 1 who is member of socially and economically backward class and holds qualification of M.Sc. (Micro Biology) and B.Ed., was serving in secondary school managed by the petitioner since 9.10.1991. Thereafter in pursuance of advertisement issued in that regard she applied for appointment to post of Assistant Teacher (Laboratory) in the Higher Secondary section of the School and on being selected and selection being approved by the District Education Officer, was given appointment with effect from 1.1.1993. That appointment was cancelled on the alleged ground that the father of the respondent No. 1 who is Headmaster of the school has obtained appointment by connivance. In this connection it was alleged that initially when the vacancy had arisen in the school for the post of Assistant Teacher (Laboratory) no objection certificate was given by the Department to place the post in general category open for all incumbents. At the same time the Department has also given No Objection Certificate dated 23.6.1992 by specifying the vacancy in the subject of English to be reserved for socially economically backward class and the qualification prescribed for such post was B.A. B.Ed. On representation being made by the Headmaster of the school purporting to be on behalf of management that in the subject of English S.E.B.C. candidates may be hardly available and hence the post in English subject may be kept for general candidates and vacancy of Assistant Teacher (Lab) may be kept for S.E.B.C. candidate as according to the Headmaster for that category science postgraduate candidates may be available from amongst S.E.B.C. class. Upon this representation, by order dated 26.6.1992 the D.E.O. communicated his no objection for exchange of posts in English to general category and the post of Assistant Teacher (Laboratory) from general category to S.E.B.C. category. Thereafter advertisement was issued in Jay Hind on 18.8.1992 inviting applications for the post of Assistant Teacher (Lab) in the Higher Secondary Section and the qualification prescribed was M.Sc. (Micro Biology) and B.Ed. (Maths & Science). The advertisement disclosed that the post is reserved for S.E.B.C. candidate. Interviews were arranged on 6.10.1992. District Education Officer had sent his representative.. The president of the school management was member of the selection committee. The third member of the selection committee would ordinarily be Headmaster

of the institution but since in the present case the Headmaster was the father of the candidate he abstained himself from participating in the deliberation of the selection committee. Instead next senior person in the school sat as a member of the selection committee. It transpires that at the time of interview only one candidate respondent No. 1 appeared before the selection committee. She was selected to be appointed though in the first instance the representative of the District Education Officer who was member of the selection committee did not sign the recommendations inter alia on the ground that sufficient number of candidates were available, though no such objection in writing were taken. However, before the Tribunal he deposed that at the relevant time he did not sign rojkam of selection because he felt that there should be at least 3 candidates before a selection of candidate is made. However, later on the District Education Officer by his order dated 4.1.1993. On a representation being made on behalf of the school management after the recommendation of the selection committee to approve the appointment accorded his approval. Thereafter the school authorities issued appointment order on 5.1.1993. On receiving the order of appointment respondent No. 1 who was already serving under the same management as teacher at the secondary school resigned from the post already held by her which was submitted before the District Education Officer as required by rules and was accepted by the school management. Thus, after relinquishing the post by resignation and its acceptance she joined at new appointment. On certain grievances raised in some quarters thereafter the respondent No. 1 was served with a show cause notice dated 16.9.1993. According to the management on refusal of registered post acknowledgement due letter containing the show cause notice, a communication was again sent under postal certificate on or about 21.9.1993 calling upon the incumbent to submit reply or explanation against proposed action within a week of service of notice. The petitioner informed that since respondent no. 1 had not replied to the show cause dated 16.9.1993 and as her appointment was void ab initio, her services are being terminated with effect from 30.9.1993 after office hours.

2. For considering the appointment of the respondent No. 1 as nullity and void ab initio the case was sought to be made out before the Tribunal that appointment of the applicant was clandestine or fraudulent because of the circumstances disclosing that the applicant is the daughter of Headmaster and that the Headmaster got no objection certificate for appointment of English teacher

in the secondary section from S.E.B.C. to one from a general category and got the vacancy of asst. teacher (Lab) in the higher secondary section converted from general category to that of S.E.B.C. category; that the required qualification for asst. teacher (Lab) in advertisement answered the exact qualifications of the applicant teacher daughter of Headmaster namely qualification of M.Sc. (Micro Biology) reserved for S.E.B.C. and that in spite of instructions of the D.E.O. to cancel the interview by his order dated 12.10.1992, the selection was acted upon and appointment was made on 5.1.1993. These were the circumstances placed before the Tribunal and these are the circumstances pressed into service before this court as well. The circumstances nowhere involve the incumbent to the post as a party to clandestine or fraudulent nature of act on her part. In fact, the learned counsel for the petitioner before this court was candid enough to state that no allegation of fraud or clandestine conduct is attributed against the incumbent. What is alleged is that since the beneficiary of the fraudulent or clandestine conduct of the father in securing appointment for her, her appointment is void ab initio. The tribunal found that it is not substantiated that applicant has obtained appointment by fraud. Management did not prove nor attempted to prove that the applicant was a party to any fraud or that she had got the appointment either by suppressing some fact or by expressing falsehoods or by misleading anyone. Her application was clear enough. She had undergone the procedure of selection and after ratification by the Department she had accepted the appointment after resigning. At least no fraud is alleged to have been committed by the applicant. Therefore, her appointment could not be cancelled without giving her a reasonable opportunity to show cause at a departmental inquiry and without obtaining the permission of the D.E.O. as is envisaged in Section 14(1) of the Act. The Tribunal also found that the school management has admitted that it has not held any enquiry under Section 14(1) of the Act. Thus, the order suffered from breach of principles of natural justice.

3. Ancillary arguments were also raised by the school management that since the appointment of respondent No. 1 was sought to be terminated on the allegation of fraud no enquiry was required to be conducted in fraudulent conduct leading to the appointment beyond issuing show cause notice for which the ratio of the decision in the case of HIRABEN J. CHAUDHARI VS. R.C. RAVAL in 1993(1) G.L.R. 66 was relied on. However, the tribunal has distinguished the

precedent on the ground that since there are no allegations of fraud against the incumbent it does not absolve the management from holding enquiry into the alleged misconduct or reason before terminating the services of the incumbent.

4. Having carefully considered the contention raised before me and material placed on record I am of the opinion that there is no substance in this petition. It may be noticed that in the show cause notice dated 16.9.1993 the only ground given for initiating proceedings to terminate the services of the respondent No. 1 was that the proceedings of selection committee dated 16.10.1992 was not signed by the representative of the District Education Officer and thereafter by communication dated 12.10.1992 the DEO had cancelled the interview and thereafter appointment has been made by Headmaster of the institution who is father of respondent No. 1 by keeping the management in dark in improper manner and by abusing his position.

5. Conspicuously notice itself does not allege any misconduct on the part of the applicant. While it refers to the letter of DEO dated 12.10.1992 but it does not refer to communication of DEO dated 4.1.1993 which accords the approval to the recommendation made by the selection committee after interviews which were held on 6.10.1992. It may be relevant to notice here that on earlier occasion vide the letter dated 12.10.1992 the reason for not granting approval to the recommendation of the selection committee was that the advertisement for the post was not published in more popularly circulated papers like Gujarat Samachar, Jansatta or other dailies which may have resulted in less number of candidates. However, as was found by the Tribunal and about which there is no dispute between the parties that in the matter of selection and appointment to the reserved category for SC/ST and SEBC, the requirement of at least minimum three numbers of applicants is not there and selection and appointment can take place even in case single candidate is available, but which was the reason disclosed by the representative of the DEO for not signing the rojkam and the proceedings that has resulted in earlier non-accord of approval. According of an approval is an administrative function and order of refusal is administrative order. An authority making administrative order in discharge of administrative function has implicit power, unless expressly prohibited to vary, modify, rectify or cancel one's own order on exigency for such variance, modification, rectification or cancellation exists. Inhibition against power to

review quasi judicial or judicial order unless expressly provided for is not against administrative orders. Reference in this connection may be made to Section 20 of Gujarat General Clauses Act and Section 21 of Central General Clauses Act, which clearly postulates that in the matter of non-judicial orders power to issue orders include power to vary, rescind, modify or cancel the same. The provisions have been held to be rule of construction which ordinarily govern the field of authority to issue rules, notifications, orders and bye-laws. Orders in the association of expression refers to subordinate legislation or non-judicial order. Moreover, that is rule of construction about authority implied in making executive or subordinate legislative orders even otherwise and statutory provision has been made as a measure of abundati cautela and is applicable unless context or subject matter points to otherwise.

6. In the present case on undisputed facts refusal to accord approval to selection committees's recommendation was on apparently non-existent premise when the same was pointed out the Authority rectified its earlier order by issuing fresh order of approval. Since the letter of approval was in accordance with the recommendation made by Select Committee which constituted of President of trusts similar member of teaching staff of school and representative of DEO himself and it was not spelling civil consequence for any one, it did not require procedural hearing as well. The fact remains that the appointment had been offered to the respondent No. 1 after approval has been granted by the DEO who was the competent authority under the statute to accord such approval and in absence of such approval no appointment could have been made in the category of posts with which we are concerned.

7. The second relevant fact to be taken note of is that undisputably the Headmaster at no point of time was in a position or in fact acted as a decision making authority. So far as conversion of vacancy of Asstt. Teacher (Lab) from general category to SEBC is concerned he only acted as a person making suggestions. The decision making was not within his domain and there were no allegation against the decision making authority for ordering change in category of posts. Nor there is any suggestion that Head Master was in any manner in a position to influence the decision of DEO in this regard. In selection committee, admittedly the said Headmaster has not participated after disclosing his interest. At the same time the selection committee constituted of the president of the society itself along with senior most

member of the teaching staff as well as the representative of the DEO. The fact that the concerned candidate is daughter of Headmaster serving in the same institution was at least known to all members of selection committee as on the date of conducting interview. In spite of these facts known to the selection committee headed by the president of the society recommended name of the respondent No. 1 for being appointed. It cannot be said that the selection committee made its recommendation for appointment fraudulently or conniving nor there is any such allegation against the selection committee. It is not the case of the management either that the incumbent was not eligible for the posts or was not suitable for the post and yet she has been selected by dubious method nor it is a case where even after appointment her work has been found to be not satisfactory. Therefore, at best until the time of making selection and making complaint by other quarters the only objection to the process of selection was non-circulation of the advertisement in a widely circulated newspaper so as to enable more number of candidates to apply in response. But the fact remains that only one candidate had come forward and her relation with Head Master was clearly before the selection committee. It was also within the knowledge of Selection Committee that she was already serving at primary section of the school. Even thereafter, appointment has not been offered by Headmaster on his own but after seeking approval from the DEO inasmuch as he could not have offered appointment without securing such approval. Therefore, appointment offered to the respondent No. 1 was direct result of recommendation made by selection committee to which Headmaster was not a party followed by approval granted by the DEO over which the Headmaster has no control nor there is allegation at any point of time that the incumbent herself was responsible in any manner for creating such situation for her appointment. Such is not the allegation even in the show cause notice. In that view of the matter, no fault can be found with the Tribunal's conclusion that neither it has been proved nor attempted to prove in any manner that the applicant (respondent No. 1) was party to any fraud or that she had obtained the appointment fraudulently either by suppressing or by expressing falsehoods or by misleading anyone.

8. Likewise no error much less error apparent on the face of record could be contended about the conclusion that the termination order has been made in breach of principle of natural justice. The Tribunal has held that school management has not held enquiry as envisaged under

Section 14(1) of the Act. It had not obtained permission of D.E.O. prior to issuance of termination order. Both are statutory requirements. These facts are not disputed before me. However, in this connection the only plea advanced before me was that where termination is affected on the ground of fraud holding of enquiry beyond the stage of giving show cause notice is not necessary. Reliance was placed on a decision of this court referred to above.

9. Having carefully perused the aforesaid decision I am unable to find any such broad proposition in that. The court in the first instance found that termination of an employee wherein allegation of fraud, misrepresentation or mistakes are stated would amount to visiting the employee with evil consequences and permanently stigmatise him without following the rudimentary principles of natural justice. It would not be an order of termination simpliciter but it would be an order of termination based on the allegations of fraud, misrepresentation or mistake which would disentitle the employee from future employment in any public employment. Such an order therefore cannot be passed without following rudimentary principles of natural justice, namely of informing the party the reason for his termination and providing the opportunity to tender his explanation with evidence and consideration of such an explanation and evidence by the employer. The aforesaid ratio of the decision rather supports the conclusion of the Tribunal that holding of an inquiry before termination of services of an incumbent takes place on the ground of fraud, misrepresentation or mistake is rudimentary.

10. Further observation that `regular departmental enquiry in my opinion is not necessary nor is any oral evidence required to be adduced or permitted to be adduced', does not convey the dispensation with requirement of adherence to principle of natural justice of opportunity to defend oneself. The observation has been hedged with further observation in continuation that further explanation of the employee together with whatever documents he has in his possession should be entertained and considered and action should be taken thereafter to avoid the contract of employment on the ground that it was obtained by fraud, misrepresentation or mistake. The observation in its entirety cannot be read out of context as has been sought to be read in isolation of its full text by the learned Counsel. It would go to show that these observations are referable to the question of nature of enquiry which may be sufficient

before action could be taken rather than dispensing with the necessity of holding any enquiry at all as has been urged by the learned counsel. These observations appear to have been made in the light of conclusion arrived at in the earlier part of the judgement that appointment of a person on post is a contract of service entered with the statutory body and is governed by the provisions of Contract Act and voidable contract could be avoided on such circumstances but it does not cease to exist in the case of suppression of true facts and disclosure of untrue facts or non-disclosure of material facts. The court said that it cannot be said that there is no contract at all for the other party acting on such representation, but it can be said that the other party would not have consented if he had the facts before him. Therefore, voidable transaction until it is avoided is valid, and the things done under such contract cannot afterwards be undone. In other words, when a voidable contract is voided by the party affected thereby, avoidance takes effect from the time it is avoided and not from the date of the transaction. These observations would go to show that the principle of avoidable contract has been applied in making the aforesaid observation to the contract of service under rules which mean that when the authorities have set aside the order on the ground of fraud, misrepresentation or mistake and it can be taken to have resorted to avoid the contract and determination of issues about fraud etc. may be left to be resolved through later on appropriate proceedings when such avoidance is challenged. But this decision does not lay down that at no stage the party to contract avoiding contract on the ground of fraud misrepresentation or mistake is absolved from establishing such fraud, misrepresentation or mistake if such avoidance is challenged in proper forum. However the question whether such principles apply to service contract or not was neither before the court in the aforesaid case nor arises for consideration in the present case. Therefore, this question need not be pursued further. Suffice it to say that for the present there being no allegation of fraud, misrepresentation or mistake against the party to the contract, namely, respondent No. 1 the aforesaid observation even in the isolation as suggested by learned Counsel for the petitioner cannot be applied to the present case and is clearly distinguishable. The aforesaid case does not deal with the case where either of the parties to the contract is not guilty of fraud. It may also be noticed that in the aforesaid decision a distinction has been drawn in the nature of enquiry to be held where allegation of fraud is there from the cases where allegations are merely acting on misrepresentation

or mistake. It is neither a case acting on fraud by the incumbent nor any misrepresentation is made by respondent No. 1. At best it could be said that the petitioner acted under an unilateral mistake. The observations made in the aforesaid decisions does not absolve the employer for establishing the grounds for termination in a properly held enquiry other than in case of fraud alleged against the affected person.

11. Looking from that point of view also the conclusion of the tribunal is supported fully. As has been noticed above that no enquiry has been conducted in the alleged misconduct apart from issuing notice. It is not even the case that before issuance of notice by holding a preliminary enquiry prima facie conclusion was reached by the management. Moreover, the chain of events suggests that notice issued on 16.9.1993 was not served. Merely by receiving registered envelopes one does not get to know what is in the cover. Thereafter, it is shown that the notice was again sent on 21.9.1993 under certificate of posting. Under notice, a week's time was given to reply from the date of receipt of the notice. No attempt has been made to show as to when the notice was actually served. Taking the next day of posting as earliest date on which it could have been delivered, the order has been made on 29.9.1993 i.e to say on 7th day when the notice could be deemed to have been served on the respondent No. 1 at earliest. It goes to show that a decision was already reached to terminate the services of respondent No. 1. No enquiry was intended to be held and on the expiry of time, as if Shylock's pound of flesh was due, order was issued terminating services reflecting the mind that the management had no intention to adhere to the standards of reasonable opportunity of being heard to be afforded to the incumbent even to the minimum standard envisaged in the decisions of this Court, so stoutly relied on by it for dispensing with such opportunity.

For the reasons aforesaid there is no force in this petition and the same is hereby rejected. Rule is discharged. No costs.

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